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October 29, 2015

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Pamela G. Monroe, Administrator
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Re: SEA-3, Inc. ("SEA-3")
Request for Exemption
SEC Docket No. 2015-01

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Dear Administrator Monroe:

Enclosed for filing in connection with the above-captioned matter, please find the original and two (2) copies of Portsmouth Intervenors' Memorandum in Reply to SEA-3's Objection to the Intervenors' Motion to Compel.

I certify that copies of the within filing have been sent to the parties identified on the Service List on this docket.

WWW.SHEEHAN.COM

Very truly yours,

Christopher Cole (LJL)

Christopher Cole

CC/ljl
Enclosure

cc: Service List

**Site Evaluation Committee
of the New Hampshire Public Utilities Commission**

In the Matter of the Application of Sea-3, Inc.
(Request for Exemption)

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SEC Docket No. 2015-01

**PORTSMOUTH INTERVENORS' MEMORANDUM IN REPLY TO SEA-3'S
OBJECTION TO THE INTERVENORS' MOTION TO COMPEL**

The Portsmouth Intervenors¹ respectfully submit this brief Memorandum in Reply to the Applicant's Objection to their Motion to Compel responses to certain Data Requests.

Reply

Sea-3's principal arguments against producing documents and materials concerning its relationship to Purple Strategies is two-fold: (1) that the relationship between Sea-3 and Purple Strategies essentially does not matter and does not require further disclosure of documents because the "public statements" generated by the Sea-3/Purple Strategies microsite "are not Sea-3's evidence;" and (2) the information sought by the Data Requests is protected from discovery as "trial preparation." Neither of these arguments should stand in the way of disclosure.

First, Sea-3's argument that the materials are not "Sea-3's evidence" is irrelevant and largely spurious. For example, Sea-3 asserts that it "does not regulate or control the public's statements, acceptance of which is governed by NH Code Admin. R. Site 202.25." Of course, it is undisputed that Sea-3 paid for the website, which provides a visitor with specific information and solicits the so-called "public statement," using prepared text and an automated system by

¹ The Portsmouth Intervenors are Richard and Catherine Dipentima; Robert Gibbons and Patricia Ford; William and Kristina Campbell; John and Jane Sutherland; and Erica and Matthew Nania.

which the text is then sent to the Committee. Sea-3 plainly “regulates and controls” the resulting statement by soliciting it in the first place, and by providing a preferred or pre-prepared text and a method of sending it directly to the Committee. Everyone concedes that Site 202.25 plainly allows for public participation; but its drafters almost certainly never envisioned that an applicant would create the complete conduit (and apparently an accompanying marketing campaign to drive people to the website) by which the applicant could channel a specific “public statement” message to the Committee.

Sea-3’s relationship to the “public statements” is close: it (or Purple Strategies) drives people to the site; feeds them specific information; prepares the text, embedded with conclusions of fact and law; and enables the user to send the letter. Moreover and respectfully, in the absence of more complete information, it is impossible to verify if in fact the letters are genuine or if instead they are generated through inappropriate inducements or automation, i.e. “bots”. In any event, this level of involvement and enablement is, in fact, “regulation and control.”

Second, Sea-3’s assertion that the materials sought are protected against disclosure by work product or trial preparation materials “privileges” is exceedingly strained and utterly inconsistent with its other argument that the letters are not their doing. The case cited by the Applicant in its Objection sets forth the federal standard for the so-called “work product privilege:”

The work product doctrine...shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case. United States v. Nobles, 422 U.S. 225, 238 & n. 11 (1975). Under [Federal] Rule 26(b)(3), the work product doctrine applies to “documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent)....” Fed.R.Civ.P. 26(b)(3); see also 8 Charles Alan Wright

& Arthur R. Miller, Federal Practice and Procedure § 2024, at 359 (2d ed. 1994) (“[I]t is clear that all documents and tangible things prepared by or for the attorney of the party from whom discovery is sought are within the qualified immunity given to work product, **so long as they were prepared in anticipation of litigation or preparation for trial.**”).

In re Cendant Corp. Securities Litigation, 343 F.3d 658, 666 (3rd Cir. 2003) (emphasis added).

The engagement between Sea-3 and Purple Strategies, however, does not involve trial preparation in any usual sense, such as witness preparation, jury or factfinder consulting, trial strategies and trial tactics. Instead, the Statements of Work (“SOWs”), annexed to the Master Services Agreement between Sea-3 and Purple Strategies, **never** speak of trial strategy or trial preparation or trial consulting. SOW One, for example, obligates Purple Strategies to create a “strategic communications plan that will include key messages that can be used with target audiences...that may include: opinion editorials, FAQ documents, talking points, leave-behind fact sheets, or letters to the editor.” Similarly, SOW Two obligates Purple Strategies to create the microsite by which the “public comments” are generated, prepared and enabled, and nowhere mentions anything about trial preparation and trial strategy. And SOW Three obligates Purple Strategies to “perform Media Research, Planning and Placement Services” for Sea-3 and provide Sea-3 with “a digital media plan targeting key audiences.” None of the SOWs provide for services relating to things such as witness preparation, or trial strategy, or expert opinion testimony. Purple Strategies was engaged by Sea-3 to conduct a public media campaign to sell the Sea-3 expansion project, not to assist counsel for Sea-3 with the preparation of this matter. Through that media campaign, Sea-3 asked Purple Strategies to facilitate the generation of materials, to be filed with the Committee, aimed at satisfying one of the criteria for an exemption. See, e.g., RSA 162-H:4, IV(c) (“Response to the application or request for exemption from the general public indicates that the objectives of RSA 162-H:1 are met through the

individual review processes of the participating agencies”). The information sought by the Data Requests is relevant and discoverable.

While a party is entitled to make alternative legal arguments, making alternative factual arguments is far more difficult. Sea-3 argues on the one hand that the letter writing activity is not its doing. It also claims, however, that it should not be compelled to disclose information about its activities related to it because such are protected as “work product.” It would seem that either the letters are work product, or, Sea-3 has nothing to do with it. The letters cannot, as a matter of fact, be both.

Accordingly, the Portsmouth Intervenors respectfully request an Order from the Committee requiring the Applicant to immediately produce the documents, information and materials sought by the Data Requests listed above.

Respectfully submitted,

PORTSMOUTH INTERVENORS,

By Their Attorneys,

Sheehan Phinney Bass & Green, P.A.

By:



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Dated: October 29, 2015

Certification

I hereby certify that on this 29th day of October 2015, I caused a copy of the foregoing Reply to Sea-3’s Opposition to Intervenors’ Motion to Compel, to be sent via email to the persons on the Service List on this Docket.

